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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

WALTER E. DELLINGER
SAMUEL ESTREICHER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

DAVID E. NAGLE
(Counsel of Record)
LECLAIR RYAN
707 East Main Street
Richmond, Virginia 23219
(804) 343-4077

REX DARRELL BERRY
DAVIS GRIMM PAYNE
MARRA & BERRY
1111 Third Avenue, Suite 1865
Seattle, Washington 98101
(206) 447-0182

W. STEPHEN CANNON
PAMELA G. PARSONS
CIRCUIT CITY STORES, INC.
9950 Mayland Drive
Richmond, Virginia 23233
(804) 967-2914

Counsel for Petitioner

27pp

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INTRODUCTION AND SUMMARY

Respondent and his amici strain to come up with a sensible interpretation of the plain language of FAA § 1 that supports the judgment of the Ninth Circuit in this case. But the various readings they propose – that the Act excludes *all* contracts of employment, that the Act excludes *only* contracts of employment of members of the working class, or that the Act excludes *only* contracts of employment of employees working in the stream of commerce (though the statute does not say any of these things) – collectively prove only one thing: that there is no plain meaning of the statute that would justify excluding respondent from FAA provisions requiring enforcement of his arbitration agreement.

To the contrary, the meaning of the § 1 exclusion must be established by reference to its context, including the analytical framework being used by this Court at and since the time of the Act's passage. That framework tells us two things: first, laws that applied to transactions "involving" or "affecting" commerce covered all transactions within the full sweep of Congress's commerce power, *see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); second, laws that applied to employees "engaged in interstate commerce" did not cover every employee within the sweep of the commerce power, *see United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271 (1975); *Stafford v. Wallace*, 258 U.S. 495 (1922); *Ill. Cent. R.R. Co. v. Behrens*, 233 U.S. 473 (1914). Thus, the category of employment contracts excluded from the FAA by the language of § 1 is necessarily smaller than the full range of employment contracts that Congress could have regulated.

That leaves the only real question to be resolved here: which subset of employment contracts is excluded from the sweep of FAA § 1? The precise statutory context provides the answer: employment contracts of (1) "seamen," (2) "railroad employees," and (3) "any other class of workers" who

are "engaged in foreign or interstate commerce" in the same way as are seamen and railroad employees. Only that reading makes sense of, and use of, each word in the statute, while also remaining consistent with the interpretation given these statutory terms of art by this Court in closely analogous circumstances. None of the various readings proposed by respondent and his amici satisfy those criteria. The private union proceedings characterized as "legislative history" and general policy arguments they raise neither contradict, nor justify departing from, the straightforward textual interpretation followed uniformly in the federal courts for almost 50 years.

I. FAA § 1 DOES NOT EXCLUDE ALL OF THE CONTRACTS OF EMPLOYMENT THAT ARE COVERED BY THE FAA

Recently this Court emphasized that not all statutory references to Congress's Commerce Clause authority are alike. *See* Pet. Br. at 13 (discussing *Jones v. United States*, 120 S. Ct. 1904 (2000)). To the contrary, any "qualifying word[s]" used by Congress are essential to understanding the intended reach of the legislation. *See Jones*, 120 S. Ct. at 1909. In this case, the ordinary meaning of the phrase "engaged in" as it modifies "commerce" entails a more active participation in particular commercial acts than a modifier such as "involving" or "affecting," each of which suggests a more passive or attenuated connection to commercial activity.

While not discussing or even citing *Jones*, respondent does not take issue with its basic premise. What respondent argues instead is that the qualifying words "engaged in" necessarily mean the same thing as "involving," so that "engaged in commerce" must mean the same thing as "involving commerce." That argument is wrong.

1. First, respondent and amicus United States cannot contend that their interpretive positions reflect a "plain meaning" approach to the statute. Their own briefs prove

otherwise. Indeed, respondent begins his analysis with a lengthy discourse on what he describes as the "legislative history," *see* Resp. Br. at 10-17 (which in fact focuses more on internal labor union proceedings than any legislative debates, *see* discussion *infra* Part III). That approach, of course, turns the accepted inquiry on its head, for "[i]t is axiomatic that the starting point in every case involving construction of a statute is the language itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985); *see Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993). Any doubt about whether the linguistic construction respondent eventually forwards is "plain" is resolved by review of the amicus briefs assembled on respondent's behalf, many of which urge interpretations of FAA § 1 directly at odds with respondent's. *See* discussion *infra* Part II.3 (discussing various alternatives).

The United States, on the other hand, does begin with the actual statutory text, specifically by comparing contemporaneous dictionary definitions of the terms "engaged" and "involved." *See* U.S. Br. at 4, 7-9. But the United States gets the inquiry fundamentally wrong: it cites dictionaries old and new as "confirm[ing] the identity of meaning, both in common and legal usage, between the terms 'engaged in' and '*involved in*' at the time the FAA was enacted." *See* U.S. Br. at 8 (emphasis added). FAA § 2, however, does not use the phrase "*involved in* commerce"; it says "*involving* commerce." Even assuming that being "involved in" an activity is tantamount to being "engaged in" that activity, doing something "involving" an activity quite obviously does not mean that one is necessarily "engaged in" the activity itself. For instance, a commentator on Monday Night Football has a job "involving" football, but nobody would say that he is "engaged in" the sport of football. Likewise, a prosecutor's job is one "involving" crime, but she is not "engaged in" crime. Thus, a worker whose job is one "involving commerce" as this Court defined the phrase in *Allied-Bruce* –

i.e., to mean anything "affecting" commerce – is not necessarily "engaged in" the actual conduct of commerce itself.

In all events, the United States elsewhere confirms that the meaning of these phrases as used in the FAA is *not* fixed by dictionaries. *See* U.S. Br. at 16 (proper construction of "engaged in commerce" depends on "the particular legal context of the statutory provision at issue"). We fully agree with this Court's observation, also cited by the United States, *see* U.S. Br. at 18: "The phrase 'in commerce' does not, of course, necessarily have a uniform meaning whenever used by Congress." *American Building*, 422 U.S. at 277. The United States, however, would impose on that phrase an inflexible and acontextual meaning, rather than a meaning properly gleaned from "the particular legal context" in which the phrase is employed. In our view, the legal context established by pre-FAA cases and opinions of this Court construing pre-FAA statutes provides the best evidence of the distinct meanings of the terms of art "engaged in commerce" and "involving commerce" as used in the FAA.

2. Respondent also suggests that whatever distinctions may exist in those sources, *see* discussion *infra* Parts I.3, 4, can be disregarded in the context of the FAA because that statute uses the distinct phrases solely out of syntactical necessity. *See* Resp. Br. at 29-30. A transaction cannot "engage in" commerce, we are told, while a worker cannot "involv[e]" commerce. But in fact, the simplest way for Congress to have excluded from the Act's coverage all employment contracts would have been for Congress to exclude "all contracts of employment." Such an approach would have avoided all grammatical issues and ambiguity. Alternatively, to give §§ 1 and 2 parallel and equally broad meanings, Congress could have used in both the "involving commerce" language, clearly recognized as invoking the full sweep of Congress's commerce power. Just as § 2 makes the Act applicable to all transactions "involving commerce," had Congress intended to exclude all employment contracts, it most naturally would have written § 1 to exclude "all contracts of employment involving commerce." Respondent's assertion that "[g]rammatically, Congress could not have used the same connective in both provisions," Resp. Br. at 29, is not just wrong, but disregards the significant fact that Congress chose to use a distinct connective in each provision, which would not have been necessary had it in fact intended the meaning respondent advances.

3. Understandably, respondent and his amici would rather focus on extralegislative history, inapposite dictionary discussions, and grammatical misdirection than on the relevant opinions of this Court. To begin with, respondent, while acknowledging this Court's opinion in *Allied-Bruce*, flatly ignores the aspect of that opinion most pertinent to this case. In the very discussion on which respondent relies, *see* Resp. Br. at 26-27, this Court explicitly contrasted the scope of the § 2 phrase "involving commerce" with the phrase "in commerce," the phrase that appears in § 1. *See Allied-Bruce*, 513 U.S. at 273. The words "involving commerce," the Court explained, "are broader than the often found words of art 'in commerce.'" *Id.* Remarkably, respondent does not address this aspect of *Allied-Bruce*, much less come to terms with the necessary implication that the FAA § 2 coverage language is broader than the § 1 exclusion language.

Respondent also misstates this Court's decisions in *Gulf Oil* and *American Building*, and ignores *Bunte Bros.* altogether. In those cases, this Court held that the phrase "engaged in commerce" in the 1914 Clayton Act, and the phrase "in commerce" in the 1914 Federal Trade Commission Act, invoked less than the full range of Congress's commerce authority. *See* Pet. Br. at 15, 17. It follows that the subsequently enacted FAA, which contains precisely the same statutory term of art Congress had employed earlier, should be construed the same way. *See id.* at 13-17.

Respondent seeks to evade the force of these decisions by ignoring one and banishing the others to a footnote, and there insisting that "engaged in commerce" in the Clayton Act means less than the full sweep of Congress's commerce power only because Congress had amended the Act in 1950. *See* Resp. Br. at 25 n.10. That is simply incorrect: the *American Building* Court did raise the fact that the statute had been amended, but only *after* the Court had concluded, upon an independent analysis of the language, that the phrase "engaged in commerce" as it appeared in the pre-FAA statute did not cover the full range of activities within Congress's commerce power. *See American Building*, 422 U.S. at 276-79. And respondent ignores the Court's earlier observation in *Gulf Oil* that the Clayton Act's "in commerce" language, on its face and without regard to any subsequent amendments, "appears to denote only persons or activities within the flow of interstate commerce," and not activities that merely "affect commerce." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974). Respondent also wholly ignores *Bunte Bros.*, in which this Court "emphatically rejected" the contention "that 'in commerce' should be read as if it meant 'affecting commerce'" in the pre-FAA FTC Act. *American Building*, 422 U.S. at 276 (quoting *FTC v. Bunte Bros.*, 312 U.S. 349, 354-55 (1941)).[1] That contention merits equally emphatic rejection here.

4. Those decisions alone are enough to establish that the phrase "engaged in commerce" as it appeared in major pre-FAA congressional enactments was a statutory term of art

[1] The United States argues that the "25-year history of narrow construction" of the FTC Act provided justification for the narrow interpretation of the phrase "in commerce" adopted in *Bunte Bros.* *See* U.S. Br. at 16. Similar justification is provided by the even longer history of narrow construction of the FAA § 1 exclusion by the federal courts, dating back to 1953, *see* Pet. Br. at 11 n.4, 31 (citing cases), as well as Congress's consistent silence in the face of that long-settled construction, *see* discussion *infra* Part II.4.

referring to a category of people and/or activities well short of Congress's full commerce power. Even further support is found in pre-FAA opinions of this Court, which respondent and the United States struggle unsuccessfully to distinguish.

Our opening brief relied primarily on *Illinois Central Rail Road Co. v. Behrens*, 233 U.S. 473 (1914), which interpreted the statutory language of the Federal Employers Liability Act. *Behrens* explained that while Congress could have covered even employees engaged solely in *intra*state commerce working for interstate railroad companies, *see id.* at 477, the particular language Congress chose to employ in FELA covered only employees actually "engaged in *interstate transportation* or in work so closely related to it as to be practically a part of it." *Shanks v. Del., Lackawanna and W. R.R. Co.*, 239 U.S. 556, 558 (1916) (emphasis added).

Respondent argues that *Behrens* and other cases establish that Congress's use of the phrase "engaged in commerce" described the class of people constitutionally subject to the commerce power, as distinct from the class of persons outside the commerce power. *See* Resp. Br. at 21. Respondent is wrong: *Behrens* and other pre-FAA cases made clear this Court's view that Congress could have regulated employees employed solely in intrastate functions if those functions had a sufficient *effect* on interstate commerce. *See Behrens*, 233 U.S. at 477; *see also Stafford v. Wallace*, 258 U.S. 495, 528 (1922) (Congress has power to regulate intrastate activities "likely to affect interstate commerce prejudicially"); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 309 (1925) (holding federal antitrust laws governed purely intrastate mine strike due to effects on interstate commerce).

For that reason, FELA's so-called "temporal limitation," on which respondent and the United States place their emphasis, *see* Resp. Br. at 23-24; U.S. Br. at 10-13, is simply beside the point: even in view of that limitation, the relevant point is that *Behrens* and its progeny held the FELA phrase

"engaging in [interstate] commerce" applied only to employees actually engaged in interstate transportation or closely related functions, and *not* to other employees Congress had the constitutional authority to regulate. Against that interpretive backdrop, the Congress that used "engaged in . . . interstate commerce" in the FAA quite reasonably would have understood the phrase as referring only to a particular subcategory of employees similarly engaged in interstate transportation functions and not to every employee whose job had an "effect" on interstate commerce. Thus, even though the broader "involving commerce" language of FAA § 2 is now construed to reach economic transactions that "affect" interstate commerce, *see Allied-Bruce*, 513 U.S. at 277, neither the language of FAA § 1, nor the interpretive tradition against which that language was enacted, warrants giving the same sweeping construction to the § 1 exclusion.

5. As if all these objective, contextual indicia of Congress's intention in respect to the narrowness of the § 1 exclusion were not enough, direct evidence from the legislative history also reveals Congress's subjective perception that its commerce power included the authority to govern transactions merely "relating" to interstate commerce: "the [federal] control over interstate commerce reaches not only the actual physical shipment of goods but also *contracts relating to interstate commerce*." H.R. Rep. No. 68-96, at 3 (1924) (emphasis added), *quoted in* Pet. Br. at 29. Thus, though Congress evidently believed it could regulate employment contracts "relating to interstate commerce," Congress chose not to employ such language in defining the category of employment contracts excluded from the FAA. Instead, Congress excluded only those contracts of employees actually "engaged in interstate commerce," a formulation that, on its face, plainly suggests a category narrower than all contracts "relating to" interstate commerce. While respondent's analysis otherwise elevates aspects of the legislative history over the statutory text at every opportunity, respondent

makes no effort to address this historical evidence of Congress's perception that its commerce powers exceeded the narrow power to regulate the contracts of people and entities engaged in commerce.

II. THE SUBSET OF EMPLOYEES EXCLUDED BY FAA § 1 IS LIMITED TO THOSE EMPLOYEES ENGAGED IN THE TRANSPORTATION OF PEOPLE AND/OR THINGS IN COMMERCE

Once it is established that FAA § 1 cannot be read as excluding *every* employment contract otherwise within the reach of Congress's commerce power, the parties in this case bear the burden of identifying the subset of employment contracts most sensibly excluded by the language of FAA § 1. Neither respondent nor any of his amici carry that burden.

1. Under the rule of *ejusdem generis*, the general category of "any other class of workers engaged in . . . interstate commerce" is most sensibly construed by reference to the specific, narrower categories immediately preceding the general category: seamen and railroad employees. What all those classes of employees have in common is that they engage in the transportation of people and/or goods in commerce. *See* Pet. Br. at 18-23. That definition also coincides with the usage of the phrase in *Shanks* and its progeny in construing FELA, a usage that would have been familiar to the Congress that enacted the FAA.[2]

2. Respondent takes two tacks in response. First, relying on *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), he

[2] To be clear, the FELA cases are more important for the proposition that Congress could have regulated certain *intra*state activities but that FELA's "engaging in commerce" language did not reach that far. The FELA cases, however, also reflect a particular, consistent judicial construction of the phrase that Congress would have been aware of in employing the phrase in FAA § 1; they therefore add to the strong interpretive inference that the rule of *ejusdem generis* provides.

argues that *ejusdem generis* does not apply in this case. But the Court's determination that the canon was inapplicable in construction of the statute at issue in *Harrison* only confirms its applicability here. The *Harrison* Court refused to apply the canon because it applies only "when there is uncertainty," and in that case the Court "discern[ed] no uncertainty in the meaning of the phrase 'any other final action.'" *Id.* at 588. In this case, by contrast, there is obvious uncertainty as to the meaning of "any other class of workers engaged in . . . interstate commerce" *unless* the canon is applied. If that key phrase really just means, as respondent contends, "all workers," then there is no explanation why the statute (1) includes the preceding references to seamen and railroad employees since they obviously would fall within the class of "all workers", and (2) includes the "engaged in . . . interstate commerce" language at all. In other words, unlike in *Harrison*, application of the *ejusdem generis* canon is the only way to give meaning to each word in the statute.

3. The next tack taken by respondent and his amici to refute the *ejusdem generis* reading is to propose an array of alternative constructions of what each insists is, ironically enough, the "plain meaning" of the statute. But each of these readings suffers much deeper flaws than any respondent ascribes to the *ejusdem generis* construction.

(a) Respondent first attempts to avoid the import of § 1 altogether with an argument focusing exclusively on § 2: according to respondent, the § 1 language is redundant and irrelevant because § 2 itself applies only to "commercial deal[s] or merchant's sale[s]," Resp. Br. at 18 (quoting *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1999)), and does not "encompass employment contracts at all." *Id.* The notion that the FAA governs the arbitrability of only commercial disputes and not employment disputes of any kind, however, has been squarely foreclosed by repeated decisions of this Court.

This Court already has held twice that a lawsuit brought by an employee against his employer arising out of the employment relationship was subject to arbitration under FAA § 2. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Perry v. Thomas*, 482 U.S. 483, 489-91 (1987). *Perry* and *Gilmer* cannot be reconciled with respondent's contention that the FAA solely governs the arbitration of disputes arising out of commercial deals and merchant's sales.[3] *Allied-Bruce* is equally to the point. There this Court held that § 2's coverage provision extends the Act to all transactions within "the limits of Congress' Commerce Clause power." 513 U.S. at 270. It concluded that § 2 "exercise[s] Congress' commerce power to the full." *Id.* at 277. Employment contracts are well within Congress's commerce power. They are therefore within § 2's coverage provision, subject only to the precise exclusionary language of § 1.[4]

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[3] Although in *Perry* and *Gilmer* the Court was not obligated to reach the § 1 question at issue here, both *Perry* and *Gilmer* unequivocally answered the § 2 coverage issue now urged by respondent.

[4] In view of *Perry*, *Gilmer* and *Allied-Bruce*, it is difficult to understand respondent's repeated references to the Act as one addressed to "commercial" disputes. Nothing in the Act's language limits its coverage to "commercial" disputes; it covers all "contract[s] evidencing *a transaction* involving commerce." FAA § 2 (emphasis added). Indeed, this Court's oft-stated admonition that the FAA was enacted to place arbitration agreements upon the same footing as other contracts refutes a suggestion that the Act's coverage is so limited. And certainly the term "transaction" plainly includes employment agreements. *See A Standard Dictionary of the English Language* 1915 (1910) (defining transaction as "any act affecting legal rights or obligations; in the civil law, the adjustment of a dispute by mutual concession and agreement. . . .").

To the extent respondent's references to "commercial" follow the Ninth Circuit's suggestion that § 2 limits the FAA to disputes between merchants, *see Craft*, 177 F.3d at 1089, this Court's cases applying the Act to disputes between merchants and retail customers, as in *Allied-Bruce* and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and to employer-employee disputes, as in *Perry* and *Gilmer*, once again foreclose respondent's interpretation. It also bears noting that, un-

(b) Respondent argues that FAA § 1 excludes "all contracts of employment." But that is decidedly *not* what the statute says. Respondent's own amicus National Academy of Arbitrators ("NAA") describes respondent's view as "astonishing," because § 1 "by its explicit terms . . . does not exempt all contracts of employment but only those entered into by certain kinds of employees . . . ." NAA Br. at 9.

Respondent does try to explain why § 1's specific language is consistent with his theory, but admits that the references to seamen and railroad employees would be unnecessary surplusage and speculates that they were simply added as examples. *See* Resp. Br. at 33-36. But respondent makes no effort at all to deal with the clause in the provision that is most problematic for his reading: the "engaged in foreign or interstate commerce" limitation. If Congress intended to exclude *all* employment contracts, there would have been no reason for Congress to limit the exclusion to the employment contracts of workers "engaged in . . . interstate commerce."[5] Although respondent elsewhere deems the "engaged in . . . commerce" language critical, it turns out to be mere surplusage under his own theory. In our view, by contrast, that language works *with* the specified examples to exclude the employment contracts of workers like seamen and railroad

til very recently, the American Arbitration Association assigned disputes arising under individual employment agreements to its "commercial" panel. *See* AAA Br. at 5 n.4.

[5] The law professors' brief is the only one adopting respondent's view which attempts an explanation. According to that brief, Congress would have "carefully define[d]" the employment contracts identified in § 1 because it "was well aware that the Supreme Court had both placed strict limits on the regulation of the employment relationship *and* refused to construe statutes flexibly in order to save them from unconstitutionality." Law Professors Br. at 12. That argument is nonsensical: this Court's cases *constricting* Congress's exercise of its commerce power would have given Congress no reason whatsoever to use narrow language to define the transactions *excluded* from the exercise of that power.

employees (and not, for example, those of telephone and telegraph employees, other workers engaged in interstate commerce but not in transportation work[6]).

(c) Respondent's amicus NAA correctly dismisses respondent's view of the statute, but goes on to argue that the exclusion applies only to the employment contracts of "workers," *i.e.*, all members of "the working class" (whomever that might be). *See* NAA Br. at 10. Contracts of management employees (whomever that might be), by contrast, *are* covered by the FAA under the NAA's view. *See id.* at 11. But, again, that is not what the statute says. In fact, the statute explicitly contradicts that reading: the statute specifically excludes the employment contracts of "railroad *employees*," a category that is facially broader than the "workers" on whom NAA says the statute focuses exclusively.

(d) Another of respondent's amici, the American Trial Lawyers Association ("ATLA"), also rejects respondent's reading of the statute. According to ATLA, the FAA § 1 exclusion applies only to workers engaged in "the stream of commerce" – *i.e.*, the production, distribution and sale of goods in commerce. *See* ATLA Br. at 5.

Our position properly focuses on the textual and historical context of the phrase "engaged in commerce" as used in FAA § 1 – in particular, as the general category following two specific examples, and in light of its accepted meaning in the FELA context. ATLA's reading, on the other hand, would require this Court to ignore the statutory references to seamen and railroad employees, and to disregard Congress's familiarity with the meaning of the same phrase that it used

[6] *See Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877) (telegraphs are instrumentalities of interstate commerce).

in FELA.[7]

4. Ultimately, respondent's and his amici's critiques of the *ejusdem generis* reading of § 1 disregard the fundamental point that the limitation of the § 1 exclusion to transportation workers has been the dominant – indeed, exclusive – interpretation followed in the federal courts for almost 50 years. Contrary to ATLA's suggestion, *see* ATLA Br. at 13-15, in all that time the transportation-worker interpretation has never been considered unworkable or even difficult to apply. *See* Pet. Br. at 24 (citing cases). Also, despite several amendments to the statute,[8] Congress does not appear to have ever even considered amending the FAA to exclude contracts of employment beyond those of transportation workers. As this Court recognized in narrowly construing the phrase "engaged in commerce" as it appears in the 1936 Robinson-Patman Act (also enacted before the expansion of Congress's commerce power), "the courts in nearly four decades of litigation have interpreted the statute in a manner directly contrary to an 'effects on commerce' approach." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). As it did in *Gulf Oil*, this Court should decline to adopt a broad reading of the "engaged in commerce" term of art "[i]n the face of this long-standing interpretation and the continued congressional silence." *Id.* at 200-01.

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[7] ATLA's implicit suggestion that the coverage of FAA § 1's exclusion of "seamen" should parallel the membership rolls of the Seafarer's International Union (*see* ATLA Br. at 14) – a union that did not even exist when the FAA was enacted – defies comprehension. The more sensible interpretation of the "seamen" to whom Congress was referring is the same "seamen" already governed by other federal regulation at the time. *See* Shipping Commissioners Act, ch. 322, 17 Stat. 262 (1872) (amended 1890).

[8] *See, e.g.*, Pub. L. No. 101-650, § 325(a)(1), 104 Stat. 5120 (1990); Pub. L. No. 100-702, § 1019(a), 102 Stat. 4671 (1988).

III. THE VAGUE LEGISLATIVE HISTORY DOES NOT SUPPORT RESPONDENT'S READING

Respondent asks this Court to look to the legislative history of the FAA rather than its text in construing the § 1 exclusion. But whether one starts with the history or ends with it, it provides no help: the § 1 exclusion was not discussed in either committee report on the bill, was not discussed on the floor by any member of Congress,[9] and was not mentioned by a single witness in the 1924 joint hearing held on the bill. *See* Employers Group Br. at 18; *see generally id.* at 17-29 (discussing ambiguity of legislative history).[10]

The primary historical evidence on which respondent relies – reports of labor's objections to the bill – comes not from the legislative history of the statute at all, but exclusively from the proceedings of the International Seamen's Union convention and other purely internal union proceedings. *See* Resp. Br. at 12-13 & n.5. The other sources of Congress's supposed intent regarding § 1 are statements made by non-legislators to congressional committees, *see* Resp. Br. at 13-15,[11] which generally are "without weight in

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[9] The only floor statements of actual legislators cited by respondent, *see* Resp. Br. at 15-16, went exclusively to the intended scope of § 2, an issue resolved by *Perry*, *Gilmer*, and *Allied-Bruce*. *See supra* p. 11.

[10] Even the scholar on whom respondent and his amici principally rely confesses that there is "no [legislative] record whatsoever concerning the [§ 1] exemption." Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. of Emp. & Lab. L. 282, 295 n.61 (1996).

[11] Even if it were relevant, the testimony of ABA representative Piatt regarding the Seamen's Union objection focuses only on "industrial arbitration" and "labor disputes," terms which refer only to collective bargaining disputes. *See Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995). Respondent's suggestion that the Seamen's Union's objection extended to disputes arising under individual employment contracts, *see* Resp. Br. at 14 n.6, again relies on information altogether outside the legislative history. *See* note 10, *supra*.

the interpretation of a statute." *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 494 (1931); *accord Kelly v. Robinson*, 479 U.S. 36, 51 (1986). Certainly statements by non-legislators to union conventions cannot carry more weight. By contrast, the authoritative Senate report *does* state that the FAA "follows the lines of the New York arbitration law enacted in 1920." S. Rep. 68-569, at 3 (1924). Significantly, the New York law on which the Act was modeled did cover individual employment contract disputes. *See* Wesley Sturges, *A Treatise on Commercial Arbitrations and Awards* 108 n.24 (1930) (citing cases).

IV. THE POLICY ARGUMENTS INVOKED BY RESPONDENT AND HIS AMICI DO NOT SUPPORT RESPONDENT'S VIEW OF FAA § 1

The issue before the Court is the coverage of the FAA, established pursuant to § 2 of the Act, and the exception of certain contracts from the Act's coverage, as provided in § 1 of the Act. Although the impact of this Court's ruling will be substantial and wide-spread, the question presented is a narrow one which should be resolved by application of well-established principles of statutory construction.

Implicitly recognizing the difficulty in advocating a Ninth Circuit construction of the FAA which had required a determination that the traditional rules of statutory interpretation were inapplicable, *see Craft*, 177 F.3d at 1094 (Brunetti, J. dissenting), respondent and his amici have supplemented their "legislative history" arguments with an array of policy-based arguments because, they contend, various public interests will be advanced if the Ninth Circuit is affirmed. The assorted arguments they offer are unavailing, and relate to issues beyond the narrow grant of certiorari. Indeed, in advancing such arguments, respondent and several of his amici would have this Court affirm the ruling below on the basis of considerations that were neither presented to nor relied upon by the court of appeals.

1. Respondent claims that his view "furthers important federalism values." *See* Resp. Br. at 39. This contention ultimately turns on the unsupportable premise that arbitration of employment disputes is traditionally the exclusive domain of the States. Respondent and his amici, however, cite only cases observing that some regulation of employment relationships is among the many areas within the states' police power; these cases do not hold that states have any special dominion in this area. *See* Resp. Br. at 41; U.S. Br. at 29; States Br. at 6-8. Nor could they, for statutes such as the FELA, FLSA, NLRA, Title VII, ADEA, ERISA, WARN, COBRA, FMLA, EPPA, and ADA show that in the last 75 years the employment relationship has become increasingly, albeit not exclusively, a domain of federal law.

Indeed, respondent and his amici contend that the FAA § 1 exclusion should be interpreted broadly so that states can make their own rules regarding arbitration of employment claims. However, given the dominance of federal law in this area, it is undoubtedly arbitration of federal statutory claims that is most often at issue, and neither respondent nor his amici attempt to argue that states would be entitled to apply their own arbitration laws to federal-law claims. *See* Resp. Br. at 40 n.19; U.S. Br. at 30 n.13. Respondent's "federalism" concerns thus turn out to have little practical consequence for states' interest, but if accepted will have significant – and adverse – practical consequences as to the usefulness of arbitration. Although this Court repeatedly has recognized the liberal federal policy favoring arbitration, the deference to federalism urged by respondent would eliminate the stability provided by the body of federal substantive law of arbitrability. The prompt arbitration of claims arising under substantive state and federal employment laws which is now available will be replaced with uncertainty and delay as state and federal appellate courts grapple with the following questions to determine the enforceability of agreements to arbitrate employment claims: Is the

arbitration provision contained in a "contract of employment"? Does the state law of the forum state favor or limit arbitration? Are the limitations applicable to all arbitration agreements, or only to arbitration of certain claims? Is the case filed in state or federal court? Are the claims based on state law, federal law, or both? Will the arbitrability of federal claims asserted in federal courts vary based upon the law of the forum state? Will arbitrability of federal claims asserted in state court vary based upon the law of the forum state? What is the effect of removal based on diversity? Where there is a choice of law provision in the agreement, what state's arbitration law will be applicable? To what extent may claims be bifurcated between federal court and arbitration or state court and arbitration? Creation of such a complex matrix is such a daunting task that arbitration of employment claims may not survive as a viable alternative to litigation.

2. Respondent sought to avoid arbitration even before the Ninth Circuit raised the issue of the FAA § 1 exclusion, and most of his amici long have been vigorous and outspoken opponents of the use of arbitration in the workplace. Many of them have repeatedly offered their views as amici curiae, opposing efforts by employers across the nation to enforce arbitration agreements.[12] Here, too, they complain about the supposed unfairness of arbitration

[12] For example, the General Counsel of the EEOC, who is among the counsel on brief for the United States, frequently files briefs opposing efforts by employers to enforce arbitration agreements (as in three other cases involving the petitioner), often asserting essentially the same arguments that were rejected by this Court in *Gilmer*. The EEOC claims that it is "not unmindful" of this Court's decision in *Gilmer*, but believes that mandatory arbitration "agreements are inconsistent with the civil rights laws" and implies that "Congressional action to correct Supreme Court departures from congressional intent" is warranted. EEOC, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, § 1 n.2, § IV.B. (1997).

and predispute arbitration agreements between employers and employees, *see e.g.*, AARP Br. at 6-16; Lawyers Comm. Br. at 2-5, 12-13; States Br. at 10-15. All of these complaints were raised in *Gilmer* and rejected in no uncertain terms:

> Such generalized attacks on arbitration rest on suspicion of arbitration as a method of weakening the protection afforded in the substantive law to would-be complainants, and as such, they are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes. . . . We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.

500 U.S. at 30 (internal quotation marks and alterations omitted). As to amici's argument that such agreements reflect an inherent disparity in bargaining power between employer and employee, the Court's rejection was equally unequivocal: "Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at 33. If in individual cases, the Court further explained, there are "well-supported claims that the agreement to arbitrate resulted from the sort of fraud or over-whelming economic power that would provide grounds for the revocation any contract," then a particular agreement may not be enforceable. *Id.* No such claims are at issue here.[13]

[13] Respondent himself admits that this case does not present the adequacy of petitioner's arbitration procedures, *see* Resp. Br. at 45, but he nevertheless feels compelled to attack on those procedures, *id.* Indeed, in this case the only determination made as to the adequacy of the procedures is reflected in the district court's granting of the original petition to compel arbitration. *See* Joint Appendix at 43-52. Respondent's complaints – on which several amici expand, *see, e.g.*, Lawyers Comm. Br.

3. In the final analysis, only one policy interest recognized by this Court's FAA cases is relevant here: the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), which in turn counsels in favor of including arbitration agreements in the workplace within the broad coverage of the FAA unless they are clearly excluded, *See* Pet. Br. at 34. Respondent protests that the FAA's liberal policy favoring arbitration cannot be invoked where, as here, the very scope of the statute reflecting that policy is at issue. *See* Resp. Br. at 42. Respondent is wrong: that is precisely what this Court did in determining the scope of § 2 in *Allied Bruce*, 513 U.S. at 275. To the extent the reach of the § 1 exclusion is ambiguous, the broad interpretation of § 2 invoked in *Allied-Bruce* to effectuate the Act's fundamental purpose likewise counsels in favor of a narrow construction of the § 1 exclusion. *See* 2A *Sutherland Statutory Construction* §47.11 (6th ed. 2000).

CONCLUSION

The judgment of the court of appeals should be reversed.

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at 2-5 – are not only irrelevant, but inaccurate. Petitioner's Dispute Resolution Rules and Procedures, set forth in the Supplemental Joint Appendix ("S.J.A.") demonstrate that the program is neither unfair nor oppressive. The comprehensive rules provide for qualified, neutral arbitrators selected by both parties, and application of the substantive law of the jurisdiction. They provide for broad discovery, the right to representation by counsel and to subpoena witnesses, and authorize awards of attorney's fees. Injunctive relief, backpay, frontpay, compensatory and punitive damages may be awarded. *See* S.J.A. at 19-39. The limitation on some forms of damages contained in the S.J.A. has been modified automatically pursuant to Rule 18, *see* S.J.A. at 37, as a result of recent rulings. Counsel in all pending cases, including Respondent's counsel, were notified of the change.

Respectfully submitted,

WALTER E. DELLINGER
SAMUEL ESTREICHER
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

DAVID E. NAGLE
(Counsel of Record)
LECLAIR RYAN
707 East Main Street
Richmond, Virginia 23219
(804) 343-4077

REX DARRELL BERRY
DAVIS GRIMM PAYNE
MARRA & BERRY
1111 Third Avenue, Suite 1865
Seattle, Washington 98101
(206) 447-0182

W. STEPHEN CANNON
PAMELA G. PARSONS
CIRCUIT CITY STORES, INC.
9950 Mayland Drive
Richmond, Virginia 23233
(804) 967-2914

Counsel for Petitioner, Circuit City Stores, Inc.

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